SUPREME COURT, U. S.
FILED
JUN 19 1969
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1969

No. 260

GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, MOBIL OIL CORPORATION and SINCLAIR REFINING COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent,

and

THE AMERICAN OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE OIL COMPANY and CITIES SERVICE COMPANY,

Respondent-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

A. DONALD MACKINNON
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Petitioner Humble Oil & Refining Company

LEO T. KISSAM
120 Broadway
New York, N. Y. 10005
Attorney for Petitioner Gulf Oil Corporation

JOHN E. F. WOOD
140 Broadway
New York, N. Y. 10005
Attorney for Petitioner Mobil Oil Corporation

HAROLD F. MCGUIRE
59 Maiden Lane
New York, N. Y. 10038
Attorney for Petitioner Sinclair Refining Company

June 19, 1969

INDEX

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	5
A. The decision of the District Court, if left to stand, will deny any appellate review of an accused's constitutional claim not to be twice tried for the same offense	5
B. The decision of the Circuit Court conflicts with the decisions of this Court and two of the other Courts of Appeals	7
CONCLUSION	11
APPENDIX A—Opinion of District Court	A1
APPENDIX B—Order of District Court denying Petitioners' Motion to bar trial on the ground of double jeopardy	A6
APPENDIX C—Order of Court of Appeals dismissing the appeal	A7

TABLE OF AUTHORITIES

Cases

PAGE

Chabot v. *National Securities and Research Corp.*, 290 F. 2d 657 (2 Cir. 1961) 8

Cobbledick v. *United States*, 309 U. S. 323 (1940) ..10, 11

Cohen v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) 5, 7, 8, 9, 10

Downum v. *United States*, 372 U. S. 734 (1963) 6

Ex Parte Lange, 18 Wall. 163 (1873) 5

Eisen v. *Carlisle & Jacquelin*, 370 F. 2d 119 (2 Cir.), *cert. denied* 386 U. S. 1035 (1967) 8, 9

Gillespie v. *United States Steel Corp.*, 379 U. S. 148 (1964) 8, 9

Green v. *United States*, 355 U. S. 184 (1957) 6

Kyle v. *United States*, 211 F. 2d 912 (9 Cir. 1954) ... 8

Roberts v. *United States District Court for the Northern District of California*, 339 U. S. 844 (1950) ... 8

Stack v. *Boyle*, 342 U. S. 1 (1951) 8

Swift & Company Packers v. *Compania Colombiana Del Caribe, S. A.*, 339 U. S. 684 (1950) 7

United States v. *Arkansas Fuel Oil Corporation* (C. R. No. 13318, N. D. Okla.) 4

United States v. *Ball*, 163 U. S. 662 (1896) 6

Constitutional Provision

Double Jeopardy Clause of the Fifth Amendment 3

Statute

28 U. S. C. § 1291 .....2, 3, 7, 8, 10

Supreme Court of the United States

OCTOBER TERM, 1968

No. _____

GULF OIL CORPORATION,
HUMBLE OIL & REFINING COMPANY,
MOBIL OIL CORPORATION and
SINCLAIR REFINING COMPANY,
Petitioners,

—against—

UNITED STATES OF AMERICA,
Respondent,

and

THE AMERICAN OIL COMPANY,
THE ATLANTIC REFINING COMPANY,
CITIES SERVICE OIL COMPANY and
CITIES SERVICE COMPANY,
Respondent-Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners seek a writ of certiorari to review an order of the United States Court of Appeals for the Third Circuit which dismissed the appeals of petitioners. The appeals were taken from an order of the United States District Court for the District of New Jersey which denied petitioners' motion to bar their trial on the ground that to pro-

ceed with such trial would irretrievably deny petitioners their rights under the Double Jeopardy Clause of the Fifth Amendment.

OPINIONS BELOW

The opinion of the District Court (Wortendyke, U.S.D.J.) is reported at 296 F. Supp. 538 and printed as Appendix A, pp. A1-A5, *infra*. The order of the District Court is printed as Appendix B, p. A6, *infra*. The order of the Court of Appeals granting the Government's motion to dismiss the appeals is printed as Appendix C, p. A7, *infra*.

JURISDICTION

The order of the Court of Appeals granting the Government's motion to dismiss the appeals is dated and was filed on May 23, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Double Jeopardy Clause of the Fifth Amendment protect an accused against the hazards and harrassment of a second trial for the same offense or merely warrant reversal of conviction after a second trial for the same offense?

2. If the Double Jeopardy Clause protects an accused against the hazards and harrassment of a second trail for the same offense, is the District Court to be the court of last resort in preserving such protection or is the order of the District Court denying petitioners' motion to bar trial on the ground of double jeopardy to be appealable as a final decision under 28 U.S.C. § 1291?

3. Does deferment of appellate review of an order of a district court denying a motion to bar trial on the ground of double jeopardy deny an accused the full protection of his constitutional rights under the federal judicial system?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The constitutional provision involved is the Double Jeopardy Clause of the Fifth Amendment, which provides:

> "No person shall . . . for the same offence . . . be twice put in jeopardy of life or limb;"

The statute involved is 28 U. S. C. § 1291, which provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

On April 8, 1965, petitioners and respondent-defendants were indicted in a three-count indictment. Count I charged all defendants with participating in a conspiracy in violation of Section 1 of the Sherman Act to fix the price of gasoline in the States of New Jersey, Pennsylvania and Delaware from at least as early as 1955 through the return date of the indictment. Counts II and III, respectively, charged four of the defendants with conspiracy to monopolize and an attempt to monopolize in violation of Section 2 of the Sherman Act. Petitioners have pleaded not guilty.

On January 6, 1969, petitioners moved to bar their trial under Count I on the ground that such trial would violate the rights accorded them by the Double Jeopardy Clause of the Fifth Amendment. Petitioners contended that Count I charged them with the same offense for which they had been tried and acquitted in *United States* v. *Arkansas Fuel Oil Corporation* (C. R. No. 13318, N. D. Okla.)—to wit, a conspiracy in violation of Section 1 of the Sherman Act to fix gasoline prices in, among others, the States of New Jersey, Pennsylvania and Delaware during a portion of the same time period—and that trial under Count I was therefore barred by the Double Jeopardy Clause.

Judge Wortendyke denied the motion (Opinion, Appendix A, pp. A1-A5, *infra*), and on February 28, 1969, an order was entered to that effect (Appendix B, p. A6, *infra*).

Petitioners filed a timely notice of appeal on March 7, 1969, because they believed that Judge Wortendyke erred in not granting their motion to bar trial and that an immediate appeal was the only way in which they could obtain effective appellate review of their claimed constitutional right not to be tried twice for the same offense.

On May 9, 1969, the Government moved to dismiss petitioners' appeals claiming that the order from which the appeals were taken was not a final order and that petitioners must wait until after the trial for the Circuit Court to determine whether the trial itself would deny appellants their fundamental constitutional rights under the Double Jeopardy Clause.

Petitioners opposed the motion and contended that since this Court and other courts have ruled that the protection afforded by the Double Jeopardy Clause was the protection against an accused's being twice placed in jeopardy by a second trial, the order of the District Court must be considered final if effective appellate review was ever to be afforded by the federal judicial system.

The Government's motion to dismiss was granted by the Circuit Court (Freedman, Seitz and Aldisert, C. JJ.) without opinion by an order entered May 23, 1969 (Appendix C, p. A7, *infra*).

REASONS FOR GRANTING THE WRIT

This Court should now review and reverse the decision of the Court of Appeals because it is only now, before being put in jeopardy by a second trial, that petitioners can have effective appellate review of their claim that the trial itself will deprive them of their fundamental constitutional rights under the Double Jeopardy Clause. The decision of the Circuit Court thus raises the important question of federal law as to whether there will be effective appellate review of an accused's right under the Double Jeopardy Clause or whether the determination of that basic right will be left in the sole province of the district courts. This question has not been, but should be, settled by this Court. The decision of the Circuit Court should also be reviewed by this Court because the conclusion reached as to the appealability of the District Court's order is in conflict with the decisions of this Court in cases such as *Cohen* v. *Beneficial Industrial Loan Corp., infra,* and in conflict with the decisions of two other Circuits.

A. The decision of the District Court, if left to stand, will deny any appellate review of an accused's constitutional claim not to be tried twice for the same offense.

The decisions of this Court have long and clearly held that the thrust of the Double Jeopardy Clause is to preclude a second trial for the same offense and not merely to afford a ground for an appellate court to reverse conviction after the second trial for the same offense. *Ex parte Lange,* 18

Wall. 163, 169 (1873); *United States* v. *Ball,* 163 U. S. 662, 669 (1896); *Green* v. *United States,* 355 U. S. 184, 187-88 (1957); *Downum* v. *United States,* 372 U. S. 734, 736 (1963). The Court's position is well summarized in its opinion in *Green* v. *United States*:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. In his Commentaries, which greatly influenced the generation that adopted the Constitution, Blackstone recorded:
>
> > " '. . . the plea of *auterfoits acquit,* or a former acquittal, is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence.'[4]
>
> "Substantially the same view was taken by this Court in *Ex parte Lange,* 18 Wall. 163, at 169:
>
> > " 'The common law not only prohibited a second punishment for the same offence, but it went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted.'[5]
>
> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should

---

"[4]. 4 Blackstone's Commentaries 335.

"[5]. And see *United States* v. *Ball,* 163 U. S. 662, 669:
" 'The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial.' "

not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." (at pp. 187-188)

It would be a sad commentary on the federal appellate system and the Double Jeopardy Clause itself if an accused is compelled to wait until after trial to have reviewed the constitutional question of whether he need stand trial. That is the result of the Circuit Court's decision. It precludes review until the embarrassment, expense, ordeal, anxiety and insecurity, which it is the Double Jeopardy Clause's purpose to prevent, has been worked upon the accused and his right not to be tried twice is made moot. Furthermore, by leaving the question of double jeopardy solely in the province of the district courts, the decision precludes the circuit courts of appeals from fulfilling their intended role of unifying the law developing under the Double Jeopardy Clause.

B. The decision of the Circuit Court conflicts with the decisions of this Court and two of the other Courts of Appeals.

The Government's motion to dismiss the appeals was based on its claim that the appeals were not taken from a final order and were thus not appealable under 28 U. S. C. § 1291. Petitioners assume that was the ground for the Circuit Court's decision. That decision, then, is in conflict with the principles laid down by this Court in such cases as *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949) (order denying corporation's right to statutory security from shareholder-plaintiff held appealable before final judgment); *Swift & Company Packers* v. *Compania Colombiana Del Caribe, S. A.*, 339 U. S. 684 (1950)

(order dissolving an order of attachment held appealable before final judgment); *Roberts* v. *United States District Court for the Northern District of California,* 339 U. S. 844 (1950) (order denying motion to proceed *in forma pauperis* held appealable before final judgment); *Stack* v. *Boyle,* 342 U. S. 1 (1951) (order denying motion to reduce bail held appealable before final judgment; see particularly p. 6 and Jackson, J., concurring at p. 12); and *Gillespie* v. *United States Steel Corp.,* 379 U. S. 148 (1964) (order in a Jones Act case striking state claims and claims on behalf of the brothers and sisters of the deceased seamen held appealable before final judgment).

The Circuit Court's decision is also in conflict with decisions by the Court of Appeals for the Second Circuit, *Eisen* v. *Carlisle & Jacquelin,* 370 F. 2d 119 (2 Cir.), *cert. denied* 386 U. S. 1035 (1967) (order denying class action status held appealable before final judgent), *Chabot* v. *National Securities and Research Corp.,* 290 F. 2d 657 (2 Cir. 1961) (order requiring the posting of security by the investor-plaintiffs in accordance with investment advisors contracts held appealable before final judgment), and the Court of Appeals for the Ninth Circuit. *Kyle* v. *United States,* 211 F. 2d 912 (9 Cir. 1954) (order denying motion for speedy trial held appealable before final judgment).

In *Gillespie,* this Court has said "[A] decision 'final' within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case." *Gillespie* v. *United States Steel Corp., supra,* at p. 152. The Court has recognized that there is "[A] small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen* v. *Beneficial Industrial Loan Corp., supra,* at p. 546.

In determining whether an order is appealable, a practical rather than a technical construction is to be given to finality:

> "[I]t is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' . . . [I]n deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" *Gillespie* v. *United States Steel Corp., supra,* at pp. 152-53.

The order here in question denying petitioners' motion to bar trial, although having a far greater impact on a defendant's rights, is the same type of order held reviewable in the above cases. It is collateral to the action itself, which deals with whether or not the defendants have violated the Sherman Act. And here, unlike *Cohen, supra,* where the Court stated that review after trial "will be too late effectively to review the present order, and the rights conferred by the statute if it is applicable, will have been lost, *probably* irreparably" (at p. 546, emphasis supplied), petitioners' constitutional rights *will* have been irreparably lost in the absence of review before trial. Moreover, here the right in question is an explicit constitutional and personal right while in *Cohen* the right was merely based upon a statute and designed to protect only the property of the defendant.

In *Eisen* v. *Carlisle & Jacquelin, supra,* the Court held the order reviewable because its effect, if not reviewed, was the "death knell" of the action. Here, a refusal of review will be the "death knell" of petitioners' constitutional rights not to be tried a second time for the same offense.

The *Cohen* case relies (see 337 U. S. at p. 546) on *Cobbledick* v. *United States,* 309 U. S. 323 (1940), the chief case on which the Government relied below in urging dismissal of the appeals. In *Cobbledick,* the Court did rule that denial of a motion to quash a subpoena *duces tecum* was not a final decision under the predecessor statute to § 1291. But in so ruling, the Court went on to indicate that where a claim of constitutional right is involved, appeal will lie from an order which, if not promptly reviewed, would for all practical purposes deprive the appellant of effective review of his constitutional claim:

> "This analysis of finality is illustrated by *Perlman* v. *United States,* 247 U. S. 7. There, exhibits owned by Perlman and impounded in court during a patent suit were, on motion of the United States attorney, directed to be produced before a grand jury. Perlman petitioned the district court to prohibit this use, invoking a constitutional privilege. This petition was denied and Perlman sought review here. The United States claimed that the action of the district court was 'not final' but merely interlocutory and therefore not reviewable by this Court. We rejected the Government's contention. To have held otherwise would have rendered Perlman 'powerless to avert the mischief of the order . . .' 247 U. S. at 13. Perlman's exhibits were already in the court's possession. If their production before the grand jury violated Perlman's constitutional right then he could protect that right only by a separate proceeding to prohibit the forbidden use. To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim. Due

regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes." [footnotes omitted] *Cobbledick* v. *United States, supra,* at pp. 328-329.

CONCLUSION

If the question of petitioners' constitutional right not to be tried for the same offense is not reviewed before trial, that right will be irretrievably lost. The order appealed from below is thus final. This petition for a writ of certiorari should be granted.

Respectfully submitted,

A. Donald MacKinnon
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Petitioner Humble Oil & Refining Company

Leo T. Kissam
120 Broadway
New York, N. Y. 10005
Attorney for Petitioner Gulf Oil Corporation

John E. F. Wood
140 Broadway
New York, N. Y. 10005
Attorney for Petitioner Mobil Oil Corporation

Harold F. McGuire
59 Maiden Lane
New York, N. Y. 10038
Attorney for Petitioner Sinclair Refining Company

Of Counsel:

Milbank, Tweed, Hadley & McCloy

Stryker, Tams & Dill
William L. Dill, Jr.
Henry F. Hartmann
Dillard W. Baker
Russell E. Brooks

Kissam & Halpin

Carey & Jardine
Robert Carey, Jr.
Anthony S. Genovese
Jesse P. Luton, Jr.
Frederick L. Scofield
Arthur L. Vangeli

Dewey, Ballantine, Bushby, Palmer & Wood

Riker, Danzig, Scherer & Brown
Edward N. Sherry
Charles F. Rice
Dickinson R. Debevoise

Wickes, Riddell, Bloomer, Jacobi & McGuire

Pitney, Hardin & Kipp
William D. Hardin
D. K. McIntosh
J. Howard Marshall, Jr.

June 19, 1969

APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA —*vs.*— AMERICAN OIL COMPANY, et al., *Defendants.*	Criminal Action No. 153-65

WORTENDYKE, *District Judge:*

The indictment in this case was returned on April 8, 1965. It has been under attack by four separate motions to dismiss. This Court's consent order of December 26, 1967 extended to January 8, 1968 the time within which defendants might file motions addressed to the indictment. The allegations of the indictment were summarized in this Court's opinion filed January 26, 1966, D. C. 249 F. Supp. 799. The offenses charged in the indictment are violations of the Sherman Act, 15 USC §§ 1 and 2. The violation of Section 1 of the Act is charged in the First Count. It alleges an agreement or concert of action by and among the defendants to fix motor vehicle gasoline fuel prices in the three-state area of Delaware, Pennsylvania and New Jersey extending over a period from 1955 to the date of the return of the indictment, thereby effecting a restraint of interstate commerce.

Despite the limitation imposed by this Court's order of December 26, 1967 and the imminence of trial of the indictment, all of the defendants excepting American Oil Company, filed, on January 6, 1969, a motion to dismiss the first

count of the indictment upon the ground that the trial of that count would constitute double jeopardy to the moving defendants by reason of the indictment and trial and their acquittal in United States v. Arkansas Fuel Oil Corporation, Cr. No. 3450, Eastern District, Virginia, which was tried in Tulsa, Oklahoma on February 13, 1960, and is hereinafter referred to as the Tulsa case. The present movants also assert that the Tulsa judgment amounted to res judicata in favor of movants with respect to the offense charged in Count I of the instant indictment. With the notice of the pending motion were filed, by the Court's leave, copies of the following documents: (1) The Tulsa indictment; (2) the bill of particulars relating thereto; and (3) a transcript of the oral opinion of the trial judge expressing the reasons for his grant of the motions of the defendants for direction of verdicts in their favor at the close of the evidence for the prosecution in that case. The present movants rely upon the foregoing documentation to support their burden of proof of the facts upon which they rest their present contentions of double jeopardy and res judicata.

The Tulsa indictment charged twenty-nine producers and distributors of crude oil and motor vehicle fuel gasoline, including all defendants in the present case except American Oil Company, with having conspired to fix the prices of crude oil and automotive gasoline in interstate commerce throughout forty-four states of the United States, including Delaware, Pennsylvania and New Jersey during the period commencing in November, 1956 and effective during the month of January, 1957. More specifically, paragraphs 13 and 14 of the Tulsa indictment allege:

> "13. Beginning at some time in 1956, the exact date being to the grand jurors unknown, and continuing through January 1957, the defendants, and other

persons to the grand jurors unknown, engaged in an unlawful combination and conspiracy to raise, fix, and stabilize the prices of crude oil and automotive gasoline throughout the affected market, in restraint of the aforesaid interstate trade and commerce in crude oil and automotive gasoline and in violation of Section 1 of the Act of Congress of July 2, 1890, entitled, 'An Act to protect trade and commerce against unlawful restraints and monopolies,' as amended, 26 Stat. 209 (15 USC § 1), commonly known as the Sherman Act.

14. The aforesaid combination and conspiracy consisted of an agreement, understanding and concert of action among the defendants, the substantial terms of which were that, during January 1957, for the purpose and with the intent of raising, fixing, and stabilizing the prices of crude oil and automotive gasoline throughout the affected market; (a) each defendant engaged in purchasing crude oil would increase its posted crude oil prices throughout its crude area, and, (b) each defendant engaged in marketing automotive gasoline would increase its automotive gasoline prices throughout its marketing area."

Paragraphs 13 and 14 of the instant indictment allege:

"13. Beginning at least as early as 1955 and continuing up to and including the return date of this indictment, the defendants and co-conspirators have been engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in gasoline, in violation of Section 1

of the Act of Congress of July 2, 1890, as amended (15 U.S.C. Section 1) commonly known as the Sherman Act.

14. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators the substantial term of which has been to raise, fix, stabilize and maintain tank wagon prices and retail prices of gasoline in the trading area."

[1] None of the evidence for the prosecution in the Tulsa case is before the Court on the present motion. Movants contend, however, that the indictment and bill of particulars in that case conclusively disclose that movants were initially jeopardized by the return of the Tulsa indictment and the commencement of trail thereon, and that the direction of verdicts for defendants therein constituted res judicata of the innocence of present movants of the offense charged in Count 1 of the instant indictment. Double jeopardy could not exist until a jury was empanelled and sworn for the trial of the instant indictment. Nevertheless, this Court has considered the pending motion as if the latter trial had actually commenced.

[2-4] The burden of proving double jeopardy and res judicata by a preponderance of the evidence rests upon movants. United States v. Wilson, 32 U.S. 159, 8 L. Ed. 640 (1833); Reid v. United States, 177 F.2d 743 (5 Cir., 1949). Such pleas in bar are sustainable only where the offense involved in both the first and second trials is the same. United States v. Ewell, 383 U. S. 116, 86 S. Ct. 773,

15 L. Ed. 2d 627 (1966); Dryden v. United States, 403 F.2d 1008 (5 Cir., 1968). Offenses are not the same "for purposes of the double jeopardy" clause of the 5th Amendment unless the evidence required to support conviction on one of the indictments would have been sufficient to warrant conviction on the other. Gore v. United States, 357 U. S. 386, 78 S. Ct. 1280, 2 L. Ed. 2d 1405 (1958); Ebeling v. Morgan, 237 U.S. 625, 35 S. Ct. 710, 59 L. Ed. 1151 (1915); United States v. Bruni, 359 F. 2d 807 (7 Cir., 1966).

[5] The material submitted in support of the pending motion is insufficient to enable the Court to determine whether the offenses respectively charged in the Tulsa and instant indictment would be the same because of the Court's ignorance of the evidence which was presented by the prosecution to support the former. Consequently, its sufficiency to warrant conviction under the latter has not been shown. The Tulsa court held the evidence insufficient to support the indictment in that case. The direction of a verdict there cannot be deemed res judicata here as it has not been shown that the offense charged in the Tulsa indictment is the same as the offense charged in the present indictment. Lawlor v. National Screen Service, 349 U. S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955).

The motion of the defendants other than American Oil Company to dismiss Count I of the indictment in this case is accordingly denied.

An appropriate order so directing may be presented by the Government.

REYNIER J. WORTENDYKE, JR.
United States District Judge

APPENDIX B

Order of the District Court

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

[SAME TITLE]

ORDER

In accordance with the Opinion of this Court filed February 18, 1969,

IT IS, on this 28th day of February, 1969, ORDERED that the motion filed January 6, 1969 by defendants Atlantic Richfield Company, Cities Service Oil Company, Cities Service Company, Gulf Oil Corporation, Humble Oil & Refining Company, Sinclair Refining Company, and Mobil Oil Corporation to bar trial of said defendants under Count I of the indictment herein, and to dismiss Count I as to each of them, is hereby denied.

/s/ REYNIER J. WORTENDYKE, JR.
U. S. D. J.

The foregoing order is hereby approved as to form.

MILBANK, TWEED, HADLEY & MCCLOY

By /s/ RUSSELL E. BROOKS
Attorneys for defendant
Humble Oil & Refining Company,
on behalf of all moving defendants.

/s/ BERNARD WEHRMANN
Bernard Wehrmann
Attorney for the
United States of America

APPENDIX C

Order of the Court of Appeals Dismissing Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 17,854/5/6/7/8

UNITED STATES OF AMERICA

vs.

AMERICAN OIL COMPANY, ATLANTIC RICHFIELD COMPANY, CITIES SERVICE OIL COMPANY, CITIES SERVICE COMPANY, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, SINCLAIR REFINING COMPANY, SOCONY MOBIL OIL COMPANY, INC.

ATLANTIC RICHFIELD COMPANY,
Appellant in No. 17,854

GULF OIL CORPORATION,
Appellant in No. 17,855

HUMBLE OIL & REFINING COMPANY,
Appellant in No. 17,856

SINCLAIR REFINING COMPANY,
Appellant in No. 17,857

SOCONY MOBIL OIL COMPANY, INC.
Appellant in No. 17,858

Present: FREEDMAN, SEITZ and ALDISERT, *Circuit Judges.*

Upon consideration of motion by appellee, United States of America, to dismiss appeals, and appellants' memorandum in opposition thereto, and after hearing, all in the above-entitled cases,

Appendix C

It is ORDERED that the appeals in these cases be, and hereby are dismissed.

By the Court,

FREEDMAN
Circuit Judge

Dated:
May 23, 1969

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 260

GULF OIL CORPORATION ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A7–A8) is not reported. The opinion of the district court (Pet. App. A1–A5) is reported at 296 F. Supp. 538. The order of the district court (Pet. App. A6) is not reported.

JURISDICTION

The order of the court of appeals was entered on May 23, 1969. The petition for a writ of certiorari was filed on June 19, 1969. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

357-807—69

QUESTION PRESENTED

Whether petitioners were entitled to immediate appellate review of the district court's denial of their motion to dismiss one count of a criminal indictment on the ground of double jeopardy.

STATUTE INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

STATEMENT

Petitioners seek review of an order of the court of appeals dismissing their appeal from the district court's denial of their motion to dismiss one count of a criminal indictment on the ground of double jeopardy. On February 28, 1969, the United States District Court for the District of New Jersey entered an order denying a motion by seven (including the four petitioners) of the eight defendants in *United States* v. *American Oil Co., et al.*, Criminal Action No. 153–65, to bar trial of and dismiss Count I of a three-count indictment on the grounds of double jeopardy and *res judicata*. Count I of the indictment, which had been returned on April 8, 1965, charged a violation of Section 1 of the Sherman Act, 15 U.S.C. 1, alleging that the defendants had fixed prices of automotive gasoline in the three-State area of Dela-

ware, Pennsylvania and New Jersey from 1955 to the return date of the indictment.[1] The motion to dismiss, filed on January 6, 1969, asserted that the previous indictment and trial of all of the instant defendants except American Oil Co., in a proceeding in the United States District Court for the Northern District of Oklahoma entitled *United States* v. *Arkansas Fuel Oil Corp.* (hereafter the "Tulsa case"), barred their trial on the instant indictment. In the Tulsa case, the indictment charged 29 defendants with conspiracy (directed toward a single price rise in January 1957) to fix the prices of crude oil and automotive gasoline throughout forty-four States, including Delaware, Pennsylvania and New Jersey, beginning in 1956 and continuing through January 1957. Directed verdicts for the defendants were entered in the Tulsa case.

Following submission of memoranda and oral argument, the district court issued an opinion (Pet. App. 1–5) denying the motion to dismiss Count I. The court held that the defendants had the burden of proving double jeopardy by a preponderance of the evidence and that they had failed to demonstrate that the offenses charged in the Tulsa and the instant indictments were the same.

Five of the seven defendants who had moved to dismiss filed appeals to the United States Court of Appeals for the Third Circuit. The government moved

[1] Counts II and III of the indictment charged four of the eight defendants with a combination and conspiracy to monopolize and an attempt to monopolize the automotive gas market in the same three-State area in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.

to dismiss the appeals on the ground that the order from which the appeals were taken was not a final order. After oral argument the motion to dismiss was granted (Pet. App. 7–8).[2] Four of the five appellants now seek review in this Court of the order of the court of appeals.[3]

ARGUMENT

The decision of the court of appeals correctly applies long standing principles of judicial administration in criminal proceedings established by Congress and this Court and does not conflict with the decisions of any other court. Further review at the present interlocutory stage of the proceedings is not warranted.

Congress has specified that an immediate appeal will not lie from an interlocutory order denying a motion to dismiss a criminal indictment, and that appellate review can be obtained only after a final judgment has been entered by the trial court. 28 U.S.C. 1291, 1292. The policy underlying this statutory requirement has been articulated in several opinions of this Court. See, *e.g.*, *DiBella* v. *United States*, 369 U.S. 121; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21; *Cobbledick* v. *United States*, 309 U.S. 323, 324–326. Indeed, this Court has said that the policy is applica-

[2] Four of the appellants also filed a "Petition for Writ of Mandamus or Prohibition" with the court of appeals to compel the district court to vacate its order and to dismiss Count I. On May 16, 1969, the court of appeals denied the petition. Petitioners do not seek review of this order.

[3] Three of the four petitioners are charged only in Count I of the indictment, but petitioner Gulf Oil Corporation is also charged in Counts II and III.

ble to appeals based upon claims of double jeopardy. See *Heike* v. *United States*, 217 U.S. 423, 432–433 (dictum).

Although Congress has recognized a need to permit interlocutory appeal from orders in specified situations (see *DiBella* v. *United States, supra*, 369 U.S. at 124–125), it is significant that "[e]very statutory exception is addressed either in terms or by necessary operation solely to civil actions" (*id.* at 126). This is because "* * * the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." *Ibid.* Cf. *Stefanelli* v. *Minard*, 342 U.S. 117; *Douglas* v. *City of Jeannette*, 319 U.S. 157. Thus, while "* * * this Court has held that the requirement of finality is to be given a 'practical rather than a technical construction'" (*Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152), virtually all cases in which appeal has been permitted from interlocutory orders have been civil cases, in which the interest in prompt final disposition is not so compelling as in criminal proceedings. See, *e.g.*, *Swift & Co.* v. *Compania Caribe*, 339 U.S. 684, 688–689; *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 545–547. The only significant situation in which a pre-trial order in a criminal case has been held appealable before final judgment involves orders denying motions to reduce bail. *Stack* v. *Boyle*, 342 U.S. 1. But this type of order, unlike denial of a motion to dismiss the indictment, can be challenged on appeal independently of the underlying case, and

without interrupting the course of proceedings in the trial court.[4]

Petitioners suggest (Pet. 9) that the instant order may be treated as final because it is "collateral" in the sense that it does not go to the question of whether defendants violated the Sherman Act. But this ignores the fact that any motion to dismiss an indictment goes directly to the subject matter of the case in the more important sense that if orders denying such motions are immediately appealable the proceedings below cannot go forward until the appeal is decided. The instant case well illustrates the disruptive consequences of a rule which would permit immediate appeal from denials of motions to dismiss indictments. Although the indictment here was returned on April 8, 1965, the double jeopardy claim was not raised until January 6, 1969, and was rejected by the district court on February 28. The motion was made on behalf of only seven of the eight defendants, and challenged only one count of the three-count indictment. Even had the motion been granted, a trial of all three counts would still have been necessary to determine the issues re-

[4] Petitioners' reliance on *Kyle* v. *United States*, 211 F. 2d 912 (C.A. 9), is misplaced. There the court's entertainment of an appeal from an order denying a motion for speedy trial was expressly based on the special facts of that case (*id.* at 914). Appellant was a prisoner confined under a life sentence in federal prison in California, and the government had rather clearly indicated that it did not intend either to proceed with or dismiss a 17-year-old indictment pending in Oregon charging another offense. Moreover, in the same opinion the court held that a motion to dismiss the indictment was not appealable before final judgment.

maining.[5] Nonetheless, proceedings in the district court have had to be delayed while some of the moving defendants have sought review of the order. Petitioners were plainly entitled to consideration and determination of the double jeopardy claim before trial, and they will be entitled to appellate review of that claim upon appeal from an adverse final judgment. But to permit appellate review of such motions at any stage of the proceedings would invite such motions, no matter how frivolous, as a delaying tactic and frustrate the objective of expeditious and effective administration of criminal justice.[6]

---

[5] Since, in the circumstances of this case, proof of the alleged participation by petitioners in the alleged conspiracy would, in any event, be properly admissible in the trial of the remaining alleged co-conspirators, the district court's denial of the present motion obviously was not a ruling "fundamental to the further conduct of the case." Cf. *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153–154.

[6] The principle for which petitioners contend would presumably be applicable to such motions even if made and denied after impanelling of a jury and commencement of trial. In such circumstances a right to appeal would totally disrupt orderly criminal process.

LIBRARY
SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1969

No. 260

Office-Supreme Court
FILED
JUL 25 19
JOHN F. DAVIS, C

GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, MOBIL OIL CORPORATION and SINCLAIR REFINING COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent,

and

THE AMERICAN OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE OIL COMPANY and CITIES SERVICE COMPANY,

Respondent-Defendants.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

A. DONALD MACKINNON
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Petitioner Humble Oil & Refining Company

LEO T. KISSAM
120 Broadway
New York, N. Y. 10005
Attorney for Petitioner Gulf Oil Corporation

JOHN E. F. WOOD
140 Broadway
New York, N. Y. 10005
Attorney for Petitioner Mobil Oil Corporation

HAROLD F. MCGUIRE
59 Maiden Lane
New York, N. Y. 10038
Attorney for Petitioner Sinclair Refining Company

July 25, 1969

Supreme Court of the United States

OCTOBER TERM, 1969

No. 260

GULF OIL CORPORATION,
HUMBLE OIL & REFINING COMPANY,
MOBIL OIL CORPORATION and
SINCLAIR REFINING COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent,

and

THE AMERICAN OIL COMPANY,
THE ATLANTIC REFINING COMPANY,
CITIES SERVICE OIL COMPANY and
CITIES SERVICE COMPANY,

Respondent-Defendants.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The Government's brief ignores the primary reason for review before trial—petitioners' constitutional right will be irretrievably lost otherwise.[1]

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall . . . be twice put in jeopardy. . . ." If there is no review before trial, and at trial petitioners are found innocent, there will of course be no appeal on the question of whether petitioners should have been tried. If

[1]Upon review, petitioners intend to argue that the District Court erred in the test it applied, that application of the proper test would have resulted in the granting of petitioners' motion, and that even under the test applied by the District Court its conclusion was erroneous.

petitioners are convicted at a trial, they most certainly would appeal on the ground of double jeopardy. But while a conviction could be reversed, petitioners' right not to be tried would be moot and therefore lost.

The fact that a specific constitutional right may be lost without review led this Court in *Stack* v. *Boyle*, 342 U. S. 1 (1951), to hold that an order denying a motion to reduce bail was a "final decision" under § 1291. The Eighth Amendment provides: "Excessive bail shall not be required. . . ." If review of the question of whether the bail was excessive had been deferred until after judgment, the right would have been lost. Similarly, if review of a claim of right under the Double Jeopardy Clause is deferred until after final judgment, it too will be lost.

The Government argues that the need to insure prompt disposition of criminal cases justifies deferral of review of petitioners' rights. Speed in disposing of criminal cases is a factor to be considered, but not the controlling factor where questions of clear constitutional right are involved. Justice requires that speed be sacrificed under such circumstances. The rights of the parties must be given paramount consideration where such rights will otherwise be lost.

Petitioners have cited a number of cases for the proposition that a "final decision" has been construed to permit appeal before final judgment when an important claim of right which is separable from the main issue would otherwise be denied review. The Government contends that such cases, except *Stack* v. *Boyle*, are civil and should be ignored. This Court, however, has treated the above proposition as having general application. In permitting review in *Stack* v. *Boyle*, the Court relied (342 U. S. at 6) on *Cohen* v. *Beneficial Industrial Loan Corp.*, a civil case, and in *Cohen* the Court relied (337 U. S. at 546) on *Cobbledick* v. *United States*, a criminal case. Here, furthermore, the Court is dealing with a criminal case involving clear constitutional rights. In such a case, appeal before final judgment is even more necessary than in a civil case.

The Government further contends (Gov't Br., p. 6) that the issue of whether the prior trial of petitioners creates a bar is not a collateral issue because the trial of this case could not go forward until appeal of that issue is resolved. But in each of the cases cited by petitioners (Pet. pp. 7-8), trial could not proceed until the issue on which appeal was permitted had been resolved[2]. Whether an issue is collateral is not determined by whether an appeal of a decision on the issue would halt further proceedings. An issue is collateral when it is not a step toward final judgment on the merits, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949), or "fairly severable from the context of a larger litigious process." *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S. A.*, 339 U. S. 684, 689 (1950).

The 1910 case of *Heike* v. *United States*, 217 U. S. 423, cited by the Government, construed (at 429) "final decision" to mean a decision that terminates the litigation on the merits leaving nothing to be done but to enforce the judgment by execution. That rigid construction has been greatly broadened by the many decisions which are cited in the Petition (at pp. 7-8) and which permit appeal before final judgment. Thus, the dictum to which the Government refers in *Heike* cannot be considered as authority.

The Government fears that the wheels of criminal justice would grind to a halt if questions of right under the Double Jeopardy Clause are permitted review before trial instead of after trial, when moot. That is not so. The Double Jeopardy Clause rarely is invoked. Baseless claims designed solely for delay can be dismissed as frivolous appeals. When necessary, meritorious appeals can be expedited under Rule 2 of the Federal Rules of Appellate Procedure. The granting of the instant petition need permit re-

---

[2]Here, the question of double jeopardy was raised at the earliest possible moment and with the concurrence of the trial Judge. If the Government's motion to dismiss had not intervened, the appeal might have been disposed of on the merits with no effect on the then contemplated trial date.

view before judgment only of that very small group of decisions which determine claims of substance under the Double Jeopardy Clause. For these few cases, the interests of justice require a slight delay, if one is necessary, to preserve the constitutional rights of an accused.

CONCLUSION

For the reasons stated above and in the Petition, certiorari should be granted.

Respectfully submitted,

Of Counsel:

MILBANK, TWEED, HADLEY & McCLOY

STRYKER, TAMS & DILL
WILLIAM L. DILL, JR.
HENRY F. HARTMANN
DILLARD W. BAKER
EDWARD J. REILLY
RUSSELL E. BROOKS

KISSAM & HALPIN

ROBERT CAREY, JR.
ANTHONY S. GENOVESE
JESSE P. LUTON, JR.
FREDERICK L. SCOFIELD
ARTHUR L. VANGELI

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD

RIKER, DANZIG, SCHERER & BROWN
EDWARD N. SHERRY
CHARLES F. RICE
DICKINSON R. DEBEVOISE

WICKES, RIDDELL, BLOOMER, JACOBI & McGUIRE

PITNEY, HARDIN & KIPP
WILLIAM D. HARDIN
D. K. McINTOSH
J. HOWARD MARSHALL, JR.

July 25, 1969

A. DONALD MACKINNON
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Petitioner Humble Oil & Refining Company

LEO T. KISSAM
120 Broadway
New York, N. Y. 10005
Attorney for Petitioner Gulf Oil Corporation

JOHN E. F. WOOD
140 Broadway
New York, N. Y. 10005
Attorney for Petitioner Mobil Oil Corporation

HAROLD F. McGUIRE
59 Maiden Lane
New York, N. Y. 10038
Attorney for Petitioner Sinclair Refining Company